**PUBLIC PROSECUTOR**

**v.**

**SALLY CHAN KIT TONG**

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
AJAIB SINGH SCJ
GUNN CHIT TUAN SCJ
[SC CRIMINAL REFERENCE NO. 06-2-89]
6 DECEMBER 1990

***CIVIL PROCEDURE:*** *Trial Judge's views - Simple and casual approach - Irrelevant and extraneous matters - Restrictions.*

***STATUTORY INTERPRETATION:*** *Under counter money - Gratification - Whether received corruptly - Purchase of low cost house - Price fixed by state government - Public officer - Prevention of Corruption Act 1961, ss. 2, 3(a)(i).*

The respondent S owned 99% of the share capital of Sally Development & Realty Sdn. Bhd. The prices of low cost houses to be sold by S was approved and fixed by the State Government. On 2 January 1982, the complainant T booked a house for the sum of RM49,000 and issued a cheque for RM1,000 as booking fee. S told T that in addition to the price of the house, T would have to pay RM15,000 as under counter money. The police supplied T this sum in marked notes and laid a trap on 23 February 1983. When the money was paid to S in her office, she was arrested by the police from the Anti Corruption Agency.

The respondent was charged and convicted in the Sessions Court under s. 3(a)(i) of the Prevention of Corruption Act 1961 (the Act). S was convicted and sentenced in the Sessions Court. On allowing S's appeal to the High Court, the learned Judge held that:

(a) S was not a 'public officer' and was therefore not under any legal constraint and could sell her house at any price;

(b) The demand and receipt of under counter payment (gratification) by someone like S is clearly devoid of any element of corruption in the absence of any price restriction imposed by law and therefore is not a gratification under the Prevention of Corruption Act 1961;

(c) The agreement her company had with the State Government was not binding on her, to adhere and conform to prices originally advertised by her.

The prosecution then appealed and 2 questions were reserved for determination, i.e.:

(i) Whether in a prosecution under the Prevention of Corruption Act 1961, under counter money as the term is used in the circumstances described in the judgment of the learned Judge is a gratification within the meaning assigned to it under s. 2 of the Prevention of Corruption Act 1961.

(ii) If the answer to the above is in the affirmative then whether the person receiving such gratification in the circumstances described in the said judgment received it corruptly.

**Held:**

**[1]** The definition of gratification in the Act is wide enough to include money paid as under counter money, and includes fee and reward as defined in s. 2 of the Act.

**[2]** (a) It appears that the learned Judge had taken a somewhat simple and casual approach in dealing with the provisions of the Prevention of Corruption Act; he thought that by virtue of the free market concept in the country the receipt of RM15,000 by the respondent did not amount to gratification corruptly received under the Act;

(b) the learned Judge ought to have restricted his views and interpretation within the scope of the Act without embarking on irrelevant and extraneous matters.

**[3]** In this case the price of low cost houses was approved and fixed by State Government at relevant time - any demand over and above this sum was contrary to State Government's decision. Any such demand solicited secretly, to be paid without the knowledge of the State Government would amount to corruption under.

**[4]** Section 3(a)(i) clearly states that any person who corruptly receives any gratification "for himself or for any other person" shall be guilty under the section.

**[5]** A person who corruptly receives any gratification need not be a public officer.

*[Appeal allowed. Order of Sessions Judge restored.]*

**Cases referred to:**
*Datuk Haji Harun bin Haji Idris v. PP [1977] 2 MLJ 155*
*Lim Kheng Kooi & Anor. v. Reg. [1957] 23 MLJ 199*

**Legislation referred to:**
Courts of Judicature Act 1964, s. 66
Prevention of Corruption Act 1961, ss. 2, 3(a)(i)

*For the applicant - DPP Suriyadi bin Halim Omar (DPP Muhamad Shariff bin Abu Samah with him)*
*For the respondent - Christopher Fernado; M/s. Gunaretnam & Co.*

**JUDGMENT**

**Ajaib Singh SCJ:**

This is a reference under s. 66 of the Courts of Judicature Act 1964. Two questions were reserved for determination:

(a) Whether in a prosecution under the Prevention of Corruption Act 1961 under counter money as the term is used in the circumstances described in the judgment in Seremban Criminal Appeal No. 52-108-86 is a gratification within the meaning assigned to it under s. 2 of the Prevention of Corruption Act 1961.

(b) If the answer to the above is in the affirmative then whether the person receiving such gratification in the circumstances described in the said judgment received it corruptly.

The respondent in this case was convicted in the Sessions Court under s. 3(a)(i) of the Prevention of Corruption Act 1961 and sentenced to one day's imprisonment and fined RM6,000 in default one year's imprisonment. She was also ordered to pay RM15,000 as a penalty to the Federal Government under s. 13 of the Act. The charge under which the respondent was convicted and which went up on appeal to the High Court in Seremban Criminal Appeal No. 52-108-86 was as follows:

> That you on 23 February 1983 at about 3.15 pm at No. 22 Taman Bunga Raya, Mantin in the District of Seremban in the State of Negeri Sembilan did corruptly receive for Sally Development & Realty Sdn. Bhd. a gratification to wit fifteen thousand ringgit (RM15,000) from one Tan Chong Hin as an inducement to you doing something in respect of a matter

proposed to take place to wit, to confirm the booking of a double storey low cost house to the said Tan Chong Hin and that you have thereby committed an offence punishable under s. 3(a)(i) of the Prevention of Corruption Act 1961.

Section 3(a)(i) of the Prevention of Corruption Act 1961 reads as follows:

Any person who shall by himself or by or in conjunction with any other person:

(a) corruptly solicit or receive or agree to receive for himself or for any other person any gratification as an inducement to or reward for, or otherwise on account of:

(i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years or to both.

The respondent owned 99% of the share capital of Sally Development & Realty Sdn. Bhd. The complainant Tan Chong Hin had booked a low cost house from Sally Development on 2 January 1982 for the sum of RM49,000 towards which he issued a cheque for RM1,000 as booking fee. (The maximum price of low cost houses to be sold by Sally Development was approved and fixed by the State Government at RM49,000). The respondent told Tan Chong Hin that in addition to the price of the house he would have to pay RM15,000 as under counter money. Tan Chong Hin did not have RM15,000 to pay to the respondent as under counter money and this sum in marked notes was supplied to him by the police. On 23 February 1983 a trap was laid and after the sum of RM15,000 was paid over to the respondent in her office she was arrested by police from the Anti Corruption Agency.

On appeal to the High Court the learned Judge states *inter alia:*

Is under counter money a gratification:

The appellant is not a "public officer". There is no law to prevent the appellant from selling her houses at any price, at a price higher or lower than the price she had advertised. Our trade and commerce are based on a *laissez-faire* concept of free enterprise unless constrained by law on the pricing eg essential foodstuffs.

The appellant was not selling first day cover stamps like a postal clerk who if an under counter payment or extra payment is demanded, clearly it makes it a bribe or gratification, if the postal clerk asks for RM1 extra and takes this RM1 over and above the price of the first day cover stamps. The appellant here was under no legal constraint, albeit the validless agreement her company had with the State Government the terms of which were not binding on her, to adhere and conform to the prices she had originally advertised. If the complainant does not agree to make the under counter payment demanded by the appellant for the house booked, don't buy the house. Go elsewhere to buy one. In any event, complainant happily agreed to pay this under counter money. He only changed his mind after one year and his conduct from then on of going out of his way to teach the appellant a lesson.

This demand and receipt of under counter payment by someone who is not a public officer and in the absence of any price restriction imposed by law, is clearly devoid of any element of corruption and therefore is not a gratification under the Prevention of Corruption Act 1961. No doubt there is the element of profiteering which is not an offence under the Prevention of Corruption Act 1961. This is part and parcel of a free economy and trade. A trader or businessman like the appellant here, who is not a government officer, can sell his or her goods at any price, unless the price is controlled or restricted by law to a certain level. It is the ruling of this Court that any demand and receipt of under counter money, over and above the prices already advertised, in the circumstances of this case cannot be a gratification under the

Prevention of Corruption Act 1961. May be it is an offence if the receipt of such under counter money is not disclosed in the annual accounts, under the Income Tax Act, to evade tax.

It is common knowledge that housing developers have to entertain, have to pay some people without getting receipts to succeed in their projects and probably they have to ask for under counter payments for the sale of their houses in order to balance their accounts. Ask any solicitor who is involved in housing projects, in getting permits, licences, applications for sub-division, approval of building plans and end-financing from banks, he would be able to explain these unreceipted "entertainments" prevalent during the housing boom and fortunately much less prevalent now.

The appeal is therefore allowed. Conviction is set aside and sentence quashed. Fine and penalty if paid, to be refunded to the appellant.

The learned Judge in our view arrived at a wrong conclusion in construing the definition of gratification in the Prevention of Corruption Act 1961. The interpretation of gratification in the Act is wide enough to include the sum of RM15,000 money paid as under counter money. Gratification as defined in s. 2 of the Act includes *inter alia* money, fee and reward. With respect we think that the learned Judge was also in error in holding that on the facts of this case the respondent did not receive the RM15,000 corruptly. It is quite clear on the evidence that the respondent corruptly received gratification in the sum of RM15,000 from Tan Chong Hin.

From the judgment of the learned Judge on appeal it appears that he had taken a somewhat simple and casual approach in dealing with the provisions of the Prevention of Corruption Act and he thought that by virtue of the free market concept in the country the receipt of RM15,000 by the respondent did not amount to gratification corruptly received under the Act. We feel that the learned Judge ought to have restricted his views and interpretation within the scope of the Act without embarking on irrelevant and extraneous matters. Developers of houses are free to sell their houses at any price they may fix but in the present case the price for low cost houses was approved and fixed by the state government at RM49,000 at the relevant time. Any demand over and above this sum was contrary to the state government's decision. Any such demand solicited secretly and sought to be paid under the counter without the knowledge of the State Government would certainly amount to corruption under the Prevention of Corruption Act.

In his submission learned Counsel for the respondent conceded question (a) in the reference and agreed that the sum of RM15,000 as payment for under counter money was gratification under the provisions of the Prevention of Corruption Act 1961. However he submitted that the RM15,000 gratification was not received corruptly by the respondent particularly as it was meant for her company and not for her personally. We find no merit in this submission as s. 3(a)(i) clearly states that any person who corruptly receives any gratification "for himself or for any other person" shall be guilty under the section. In the case of *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155 the accused was found guilty of corruption under the Prevention of Corruption Act 1961 although the sum of RM250,000 which he had received from the Hongkong and Shanghai Banking Corporation was not for his own personal benefit but was for the funds of UMNO.

A person who corruptly receives any gratification need not be a public officer. In the case of *Lim Kheng Kooi & Anor. v. Reg.* [1957] 23 MLJ 199 the two accused persons who were charged for corruption and abetment of corruption respectively were private individuals and they were found guilty under s. 3(b) of the earlier Prevention of Corruption Ordinance 1950.

In the circumstances therefore we are of the view that the RM15,000 received by the respondent as under counter money was gratification and that it was received by her corruptly under s. 3(a)(i) of the Prevention of Corruption Act 1961.

In the light of the evidence in this case and on the view that we have taken of the relevant provisions of the Prevention of Corruption Act 1961 we answer both the questions under reference in the affirmative. The conviction, sentence and the penalty as ordered by the learned Sessions Judge are restored.

Also found at [1991] 1 CLJ 448